In The

Supreme Court of the United States

October Term, 1968

No. 711

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA,

Appellant,

v.

THE FIRST NATIONAL BANK OF HOMESTEAD, HOMESTEAD, FLORIDA,

and

OKALOOSA NATIONAL BANK, NICEVILLE, FLORIDA,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

MOTION TO DISMISS AND/OR AFFIRM

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of Homestead.

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Appellee, The First National Bank of Homestead, Homestead, Florida, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss and/or affirm the appeal herein on the grounds that the decision of the three-judge District Court below was correct as to law and fact and that the question presented is so unsubstantial as not to need further argument.

STATEMENT

This appeal is taken from an Order entered by a three-judge Federal Court in the Northern District of the State of Florida, Tallahassee Division, on August 19, 1968.

The lower Court based its decision upon the provisions of 12 U.S.C. 548 and the case of First Agricultural National Bank of Berkshire County v. State Tax Commission, _____ U.S. _____, 20 L.Ed.2d 1138, 88 S.Ct. _____.

ARGUMENT ON APPELLANTS POINT I

Appellant alleges in Point I that 12 U.S.C. 548 permits the Appellant to levy and collect documentary stamp taxes on the shares of stock and capital debentures issued by National Banks based on option (1) of the Statute which permits the various states to tax the shares of stock of National Banks. But the Statute further requires that the tax levied under the first option must not be levied at a greater rate than that

levied on other "moneyed capital" in the hands of persons in competition with National Banks. As is clear from the language of the Statute, Congress intended the first option to be a moneyed capital tax, i.e., a tax levied on the capital of National Banks.

Pursuant to this first option under 12 U.S.C. 548, the State of Florida already levies a capital tax on the shares of stock of National Banks. This tax takes the form of an intangible personal property tax levied on the shares of stock of all National Banks in Florida, at the rate of one mill per dollar of just valuation of the stock and collected annually under the provisions of Section 199.141 Florida Statutes.

Appellees have no quarrel with this tax levied on the shares of stock of National Banks, and Appellees include herein in the Appendix a reproduction of the latest receipted intangible tax bill.

However, this tax levied under said first option of 12 U.S.C. 548 must necessarily be "in lieu of" all other tax options permitted by the Statute. In violation of this requirement, Appellant asserts that in addition to this aforementioned tax on the capital of Appellees he may also levy a documentary tax on the issuance by National Banks of their stock shares and their capital debentures. Therefore, this documentary stamp tax is not a capital tax permitted under the first option of 12 U.S.C. 548,

but actually a securities issuance tax not sanctioned by the Statute.

Moreover, Appellant asserts that he has authority to tax the issuance of capital debentures of National Banks. Said debentures may be issued by National Banks pursuant to the authority of the Comptroller of the Currency as shown in 12 C.F.R. 14.5. Although the Comptroller of the Currency treats such debentures as "capital" for certain banking purposes, they actually remain borrowed money, not equity money, and are subject to the borrowing limitations contained in 12 U.S.C. 82. These debt obligations are superior to capital stock, but subordinated to the rights of depositors and other creditors of the issuing Bank, as shown in 12 C.F.R. 14.5(b). Further, said debentures cannot be deemed to be shares of a National Bank for purposes of the first option of 12 U.S.C. 548 for one other reason; namely, at the time that the original form of 12 U.S.C. 548 was enacted by Congress as part of the National Bank Act of 1864, National Banks did not issue capital debentures, and therefore, said obligations could not be deemed to be shares of stock within the contemplation of Congress.

ARGUMENT ON APPELLANT'S POINT II

Section 201.01 Florida Statutes imposes documentary stamp taxes on any person who makes, issues, creates, or sells notes, mortgages, and other evidences of

debt, as well as on the person for whom such note, mortgage or other evidence of debt is made, issued, or to whom sold. Thus the State of Florida can treat either the maker of a note or the payee of a note liable as the taxpayer. At no time have Appellees in the instant case challenged the right of Appellant to levy and collect documentary stamp taxes from Appellant's customers who issue, make or sell such notes, mortgages or other evidences of debt. Appellees' challenge only goes to Appellant's assertion that Appellee's are liable for the payment of the tax should Appellant wish to collect the tax from Appellee. Appellees assert that they cannot be held liable as taxpayers under Section 201.01 et seq. Florida Statutes because of the overriding authority of the Federal Statutes.

All notes, mortgages and other evidences of debt acquired and owned by Appellees are their personal property, and all of the personal property of Appellees, be it tangible or intangible, chattels or choses in action, is exempt from the taxing power of the State of Florida as is clearly and emphatically set forth by the Supreme Court in First Agricultural National Bank of Berkshire County v. State Tax Commission, _____ U.S. _____ (1968). In that case, Mr. Justice Black delivered the opinion of the Court and traced the long line of decisions beginning with McCulloch v. Maryland, 4 Wheat. 316 (1819), firmly establishing the proposition that the States are without power, unless specifi-

cally authorized by Congress, to tax National Banks. Further, Mr. Justice Black reviewed the history of 12 U.S.C. 548, which originated as part of the Act of June 3, 1864, c. 106, §41, 13 Stat. 111, and declared that 12 U.S.C. 548 clearly was intended to prescribe the only ways in which the States can tax national banks. And there is no authority in 12 U.S.C. 548 permitting Appellant to tax the notes, mortgages and other evidences of debt owned by Appellees.

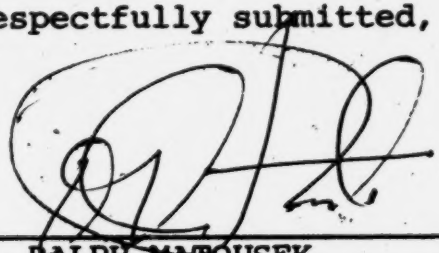
Appellant in his Jurisdictional Statement makes the same error as did the Appellee in the above-mentioned First Agricultural National Bank of Berkshire County case in asserting that the tax immunities of national banks must be Congressionally conferred. Both Congress and the Supreme Court have always deemed 12 U.S.C. 548 to be the sole measure as also the outer limit of State taxation of national banks. Therefore, unless the particular tax is specifically sanctioned by Congress under 12 U.S.C. 548, it is forbidden to the States.

CONCLUSION

It is Appellees' view that the decision of the three-judge Federal Court below is plainly correct both as to law and fact and clearly consistent with

12 U.S.C. 548 and with the numerous pronouncements of the Supreme Court. We request that this Court refuse to take jurisdiction of this case and that the Order of the District Court should be affirmed.

Respectfully submitted,



O. RALPH MATOUSEK
Counsel for Appellee,
The First National Bank
Of Homestead.

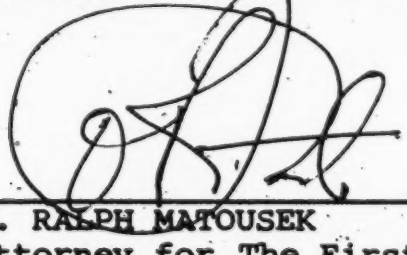
PROOF OF SERVICE

I, O. Ralph Matousek, attorney for The First National Bank of Homestead, one of the Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of December, 1968, I served copies of the foregoing Motion to Dismiss And/Or Affirm of Appellee on the several parties thereto, as follows:

1. 1. On the Okaloosa National Bank at Niceville, Niceville, Florida, Appellee, and Fred O. Dickinson, Jr., Appellant, by mailing copies of same in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

TO: James E. Moore, Esq., attorney for Okaloosa National Bank at Niceville, Niceville, Florida
Post Office Box 476
Niceville, Florida

TO: Fred M. Burns, Esq., attorney for Fred O. Dickinson, Jr.,
Office of the Attorney General
The CAPITOL
Tallahassee, Florida 32304



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APPENDIX OF APPELLEE

TAX NOTICE-RECEIPT 1967

INTANGIBLE TAX STATE OF FLORIDA

MAKE CHECKS PAYABLE TO: COUNTY TAX COLLECTOR
DADE COUNTY COURTHOUSE
MIAMI, FLA.
33130

VALUATION		
CLASS "A" @ 1/10 MILL	CLASS "B" @ 1 MILL	CLASS "D" @ 1 MILL
	869020	

PAGE	FOLIO NUMBER
760	5 56-06090 8

FIRST NATL BK OF HOMESTEAD
& AS AGT
4 N KROME AVE
HOMESTEAD FLA

THIS BECOMES A RECEIPT ONLY WHEN VALIDATED BELOW.

CLASS "A" TAX	
CLASS "B" TAX	869.02
CLASS "D" TAX	
ASSESSED PENALTY	
YOUR TOTAL TAX	869.02

J09088 DEC 167 83426 ℔

AMOUNT DUE IF PAID IN → SEE OTHER SIDE	869.02	860.33	851.64	842.95	834.26
	MARCH	FEBRUARY	JANUARY	DECEMBER	NOVEMBER